

WATER ALLOCATION PROGRAM DEVELOPMENT WATER RIGHTS SUBCOMMITTEE MEETING

MINUTES OF MEETING

October 17, 2002

Members Present:

Terrence Tierney*
Dale Thompson*
Caroline Karp
Mary Ellen McCabe
Ken Payne
Gregory Schultz

WRB Staff Present:

Kathleen Crawley
Connie McGreavy

Members Absent:

Fred Crosby
Jon Schock
John Spirito
Jennifer Cole Steele

Students:

Jennifer Henman
Katheirne Wallace
Wendy Waller

**representative of lead organizations*

I. CALL TO ORDER

With a quorum present, Prof. Thompson called the meeting to order at 1:15 P.M.

II. APPROVAL OF MINUTES

No previous minutes were required to be approved.

III. ITEMS FOR ACTION

Ms. McGreavy discussed the need for additional committee members representing relevant regulators, the Narragansett Indian Tribe, the RI General Assembly, and diverse users of the state's waters. She suggested that city solicitors and attorneys practiced in land use law would also be valuable. Mr. Tierney offered to follow up, assisted by Ms. McGreavy.

Ms. McGreavy briefly referred to background materials that were distributed to the committee. Handouts included several documents related to Connecticut and Rhode Island water law, relevant court cases, a Power Point presentation titled, "Regulated Riparianism and Markets" by Attorney Joseph Dellapenna, documentation on the US Army Corps stream flow permit for the City of Woonsocket, and a table of natural resource protection provisions for Rhode Island communities.

IV. ITEMS FOR DISCUSSION

A. Overview of Purpose of Water Allocation Program

Prof. Thompson led a discussion regarding the application of water rights in a water allocation program. He explained that the Water Resources Board (WRB) is considering a water use registration program for some, or all of Rhode Island's water users. Water data regarding how water is used is required before a regulatory body could step in and make allocation decisions. The question of which parties can claim water rights would be part of the discussion. The group discussed the scale and scope of a registration program, and whether there is a need for regulation of large versus small water users, who would be exempted, etc. Mr. Thompson clarified that issues of private well users would be different from large cities.

Ms. McGreavy explained the current use of Water Supply System Management Plans that are required by the WRB for water supply districts that pump fifty million gallons of water per year. These regulations require water suppliers to collect and submit water data to the WRB—data that would serve as the basis for a registration program. Nearly all of the plans are in, after which we will be able to better quantify which sectors are using the most water, how they are using it, where they are using it, etc. Ms. McGreavy and Ms. Crawley presented percentages of water use by sector as of 1990 when the WRB completed a baseline study of water use in the state. Ms. McGreavy gave a break down of surface water use in Rhode Island (80%) and groundwater use (20%). She added that residential water use is the predominant use (55%) in the state today, though the mix is different in each watershed. For example, residential and agricultural water uses are more prevalent in the Wood-Pawcatuck watershed, while the Blackstone is characterized by mixed commercial/industrial/residential uses.

Ms. Crawley explained that the US Geological Survey was hired by the WRB to conduct a statewide water use and availability studies by basin. Draft reports for the first two studies for the Wood-Pawcatuck and Blackstone are expected in November, after which. Information will be distributed to committees. Ms. Crawley offered to provide water use compilations by the US Geological Survey for the years 1985, 1990, and 1995 by category of use. She added that the registration committee would be looking closely at the numbers to determine the appropriate level of need for a registration system.

Prof. Thompson asked whether registration could include a provision that certain water users could not use water at a certain time. Ms. McGreavy answered that the program could take many forms, such as a provision for general water use reduction for all users, reductions in only certain parts of the state that might be triggered by hydrological indicators, or other form. Mr. Thompson suggested then, that registration could be included in some of the allocation decisions. Ms. Crawley replied that by definition, if registration becomes a regulatory process, then it would be integral to water allocation. Mr. Schultz asked whether the program was designed to be more than registration, such as a permitting program. Ms. McGreavy replied that different states handle this in different ways—most, if not all states, rely on a threshold of water use for registration to kick in. Rhode Island could decide to make small water users register and self-report, while larger water users might need to be permitted. The key is knowing how much water is being used now, and in the future. Could be a combination of voluntary and mandatory—registration process.

Ms. McGreavy reminded members that there are 75 people serving on 11 subcommittees, each of which will be looking at a specific subset of water allocation issues. She added

that while the WRB is charged with managing the withdrawal and use of the waters of the state, other agencies were making “de facto” water allocation decisions through their regulatory programs.

B. Legal Rights and Responsibilities

Prof. Thompson presented an outline of the status of public and private water rights in Rhode Island and other states under common law, federal law, state and local laws. He stated that common law creates rights that are subject to protection under the Constitution, and that if we eliminate those rights, the state could be liable for [private property rights] takings.

Discussion included legal rights and responsibilities in surface water use, groundwater use, and public trust uses. Under the Riparian Doctrine, surface water rights are given out on a “user fructury” basis, which means riparians—people who live next to lakes, rivers and streams—have the right to use water, though the waters are owned by the State of Rhode Island. Riparians have limited “natural rights” to use water for domestic purposes. Uses beyond that, such as for agriculture or transport to a public water supplier, are limited by the Reasonable Use Doctrine.

In response to a question regarding who owns the water, Prof. Thompson replied that for navigable water bodies, the state owns the water column and lands below it, even if the river runs through private property. There was some discussion as to whether this doctrine applied in Rhode Island. Mr. Schultz indicated that Rhode Island courts have granted “flowage” rights to many private users in Rhode Island. Prof. Thompson indicated that may be possible, but reiterated that if a water body is “navigable”, then the doctrine applies.

Ms. Karp understood Rhode Island law to provide for any riparian use of water, beyond water for domestic use. She cited a case where industry was allowed to take water, as long as water was available for downstream uses. Prof. Thompson clarified the definition of domestic use as “natural rights” that cannot be distributed. Under the Reasonable Use Doctrine, other water uses are allowed limitation based on other riparian rights. For example, if one riparian is withdrawing too much water at the expense of the other, than that use may be interpreted as unreasonable.

Prof. Thompson then explained groundwater rights—also given out on a “user fructury” basis. He stated that property owners have a right to extract water out of the ground under different doctrines, but it is more complicated. He indicated that he would have to study Rhode Island’s common law to determine which doctrine would be applicable. Prof. Thompson pointed out that sometimes there may be restrictions on ground water use that arise because of reductions in surface water and vice versa.

Ms. Karp asked for clarification on groundwater rights. She mentioned Connecticut’s laws that allow for exportation of groundwater off private property. She wondered whether common law limits that right of use in Rhode Island, which she felt was a key question. Prof. Thompson touched on the rule of Absolute Ownership, which is a rule of capture—property owners can use groundwater anywhere they want to. Some doctrines are more restrictive than others are and many allow exportation, somewhat dependent on whether there is harm to other landowners with a right to groundwater.

Prof. Thompson next explained Public Trust uses that go back to the issue of whether waters are navigable. He explained that the state has an obligation to protect certain uses

for the public trust, such as navigation, swimming, and environmental uses. The state retains the Public Trust rights, which can be used to limit previously existing, diversionary rights without running into takings questions. He indicated that this doctrine could be a powerful tool if there are concerns that there is not enough water for ecological purposes.

Next, he pointed out that there is common law and federal statutes to preserve rights for Indian tribes. There are also Constitutional protections for vested property rights, various drinking water regulations, and environmental protections such as for endangered species and Wild/Scenic Rivers. Some states pass their own laws for [federally-designated rivers] requiring that rivers must be protected and/or maintained in pristine condition. Prof. Thompson next touched on some of the federal permitting authorities and acts including the US Army Corps, the Clean Water Act and interstate allocation compacts.

C. Regulatory Authorities

Prof. Thompson invited members present to explain their organization's regulatory authority (state/federal/local) over management and use of the waters of the state. Agencies included the WRB (water supply and allocation), the RI Department of Environmental Management (regulation of freshwater wetlands and water quality), and the RI Department of Health (Safe Drinking Water Act).

Mr. Schultz explained DEM's regulatory view that it has the right to regulate withdrawal, from both surface waters and groundwater when they affect the quality of the water of the state, habitat or wetlands. He indicated that there were some new wellheads proposed for the state that would fall into that category. Mr. Schultz mentioned that DEM has overlapping jurisdiction with the WRB, and will regulate if it believes an action could have a measurable effect. He stated that DEM has not recently studied how a large groundwater withdrawal would effect the environment. Mr. Tierney asked how does DEM finds out about projects that may have an effect, and how, mechanically, does DEM determine this. Mr. Schultz admitted that it is difficult and sometimes occurs after-the-fact. DEM encourages parties to apply when they see new activities proposed, such as a wellhead. If parties disagree with DEM's interpretation, then there may be enforcement action. Mr. Tierney asked if DEM has an application to withdraw water. Mr. Schultz explained that DEM regulates through a water quality certificate process or wetlands alterations permit.

Ms. Karp pointed out that fire companies do not likely apply for water withdrawal permits from surface water bodies. While it is better to use nonpotable water for fire fighting, she thought that they should, considering that environmental damage can occur. Ms. McGreavy indicated that there are many questions regarding water use and a Priority Uses Committee will be handling some of these issues. Ms. McGreavy referred to the two, fact-based scenarios that committees could use—one for the Wood-Pawcatuck and one for the Blackstone—in their decision-making. The objective would be to take particular variables in those areas and target discussion to real life situations.

The Water Rights/Regulatory Authority Committee would be charged with understanding the legal framework that water users operate under. Ms. McGreavy referred to a matrix of Water Resources Management authorities that was put together in an attempt to establish which agencies and organizations had primary and secondary jurisdiction over water. She also referred to a matrix of laws and policies that the state of Connecticut assembled while evaluating their water allocation program. Ms. Crawley added that there are several State Guide Plan elements relating to water, the Comprehensive Planning Act, the Zoning

and Land Use Enabling Act, Water Supply Systems Management Plans, various zoning ordinances that limit water use such as groundwater protection overlays and plumbing codes, and numerous public laws governing franchises for water districts and their management authority.

Ms. McGreavy emphasized that the committee needs to sort out the legal framework before other committees can answer some of the questions. Ms. Karp suggested that the committee research the state of California regarding the balance between private rights and public rights. She felt that the state of law in Rhode Island is anarchic, and that many users feel that they are not subject to authority. Ms. Karp felt the committee should establish the basis for regulation. Ms. McGreavy added that there would also be conflict resolution issues. She mentioned that the full Water Allocation Program Advisory Committee would look to the Water Rights Committee to report in December or January.

Mr. Payne then returned to the subject of water rights. He suggested that the group assess which water rights contribute to the functionality of water systems, i.e., social systems; which water rights contribute to the dysfunctionality of water systems; and which statutes are susceptible to change. Prof. Thompson stated a goal of the committee would be to determine how to change statutes or interagency relations to address management of water withdrawals and use. Rather than trying to develop a universal understanding of regulatory authority, we first need to address water rights. Mr. Payne felt the committee should work toward objectives keeping the coming legislative session in mind. February was established as the goal for proposing new legislation.

Ms. Karp stated that legislation was recently passed in California, which put all unallocated water in the domain of the state. All water utility districts were abolished and a central agency was created to manage water for the public trust. She questioned whether the RI General Assembly would consider something like this. Mr. Payne responded that in Rhode Island, statutes were enacted case-by-case. He could envision many political catastrophes if Rhode Island did not carefully sort out the issues in advance of any legislative proposals. Prof. Thompson stated that the Riparian Doctrine has changed the law slightly, and that California might not be the best model. He felt that smaller changes were more likely to occur rather than sweeping changes.

Mr. Payne believed that a chronology of water rights, matched up with technological and economic change, would be illustrative in terms of assessing whether existing water rights premises are appropriate for today. He referred to the time when the textile industry was the predominant water use in Rhode Island and that laws were written accordingly; the same could be said for agriculture. In essence, he felt that today's uses of water were not contemplated when many water laws were first established. He pointed out that the public's values are changing, and that, in general, there is greater environmental awareness.

Prof. Thompson agreed to prepare a summary of the status and evolution of public and private water rights in Rhode Island with an emphasis on where water doctrine had changed and what events may have prompted that change. He added that any water allocation program should consider the conjunctive use of ground and surface waters. Mr. Schultz agreed to review material written by Catherine Hall, former Deputy Chief Legal Counsel for the DEM, concerning water and water rights in Rhode Island.

The committee agreed to prepare a diagram illustrating water use coupled with applicable laws and regulations/regulators. The intent would be to focus on where conflict between

water uses/users occurs (versus conflict between organizations with overlapping jurisdiction). Ms. Karp of Brown University agreed to prepare the diagram and circulate it to members who would indicate at which points in the water use process various regulators had purview. Ms. Karp asserted that a good water allocation approach would guarantee reasonable use.

D. Challenges Facing the Allocation Program

The group agreed that major challenges would likely revolve around conflicts associated with regulatory authority, as well as conflict arising out of various interpretations of water rights at the local level.

E. Development of Goals and Plan for this Committee

Mr. Payne explained Governor Almond's Executive Order creating "Growth Centers". He stated that the Senate Policy Office, the RI Public Expenditures Council, and the RI Economic Policy Council were hosting a meeting on "Quality of Life" which would address the notions of "sense of place" and, potentially, growth management. Ms. McGreavy asked how the committee might prioritize water issues in the next legislative session. Mr. Payne advised that, given the times, coupling water management with economic development might be the best strategy.

V. OTHER BUSINESS

Other than scheduling the next meeting for Oct. 31, 2002 at 2PM (WRB office), no other business was discussed.

VI. ADJOURNMENT

On a motion by Prof. Thompson, seconded by Mr. Schultz, the meeting adjourned at 3:45 P.M.

Respectfully submitted,

Gregory Schultz
RI Dept. of Environmental Management

Connie McGreavy
RI Water Resources Board

**Note: For more information on this committee or the Water Allocation Program, visit:*
<http://www.seagrant.gso.uri.edu/scc/wrb/index.htm>